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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 451, 531, 550, 551, 591, and 630

RIN: 3206–AG15

Incentive Awards; Pay and Leave Administration

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to incorporate certain incentive awards and pay and leave administration rules contained in the provisionally retained Federal Personnel Manual material, which will sunset on December 31, 1994, into the Code of Federal Regulations and to remove certain recordkeeping and reporting requirements.

DATES: The interim rules are effective on January 1, 1995. Comments must be received on or before February 27, 1995.

ADDRESSES: Comments may be sent or delivered to Donald J. Winstead, Acting Assistant Director for Compensation Policy, Office of Personnel Management, Room 6H31, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Barbara Colchao, (202) 606–2720, concerning questions about the interim regulations for incentive awards in 5 CFR 451, and Belva MacDonald (202) 606–1413, concerning questions about the interim regulations for pay and leave administration in 5 CFR 531, 550, 551, 591, and 630.

SUPPLEMENTARY INFORMATION: On September 7, 1993, the Report of the National Performance Review recommended that the Office of Personnel Management (OPM) deregulate personnel policy by phasing out the 10,000-page Federal Personnel Manual (FPM). The FPM Sunset Document published on December 31, 1993, provided that certain FPM materials would be provisionally retained through December 31, 1994, to allow time for the development of any regulations, delegations of authority, or manuals necessary to authorize agency flexibility or, where required, to continue Governmentwide uniformity. A small number of miscellaneous incentive awards and pay and leave administration provisions in the FPM were retained for these reasons, and OPM is incorporating these provisions into the Code of Federal Regulations (CFR). These rules relate to:

(1) Incentive awards—cash award limitations, documentation of informal recognition items, and eligible award recipients;

(2) Application of the two-step promotion rule for promotions from GS–1 and GS–2 positions;

(3) Application of leave without pay towards the competition of waiting periods for within-grade increases;

(4) Counting travel time as "hours of work";

(5) Sunday premium pay for periods of paid leave and excused absence;

(6) Payments during evacuation;

(7) Back pay computations;

(8) Computing cost-of-living allowances for employees receiving pay retention; and

(9) Leave for uncommon tours of duty.

No new requirements will be established by these regulations. In addition, in an ongoing effort to reduce administrative burden, OPM has removed the recordkeeping requirements related to waiving the biweekly pay cap on premium pay and the reporting requirements for payments during evacuation. A summary of the provisions included in these regulations follows.

Incentive Awards

Cash Award Limitations

The interim regulations amend 5 CFR 451.106(b) and 451.107(a)(3) to clarify that group awards may exceed $10,000 and not require OPM approval, and may exceed $25,000 and not require Presidential approval, so long as no individual in the group is granted more than $10,000 or $25,000, respectively. In the past, agencies have sometimes found confusing the current law and regulation concerning the maximum cash awards that can be granted with and without OPM approval. These limits apply to individuals whether the contribution being recognized was provided solely by the individual or as part of a group. These interim regulations do not limit the size of group awards. (These interim regulations reflect material found in FPM Letter 451–11, Attachment 1, section 2–2, February 9, 1993.)

Documentation of Informal Recognition Items

The interim regulations amend 5 CFR 451.103 and 451.107(b) to include a new definition, *informal recognition items*, to help agencies distinguish nominal informal recognition items from other nonmonetary awards and to provide for agency flexibility with respect to documentation and approval requirements for informal recognition items. This is consistent with agencies' use of their authority under 5 U.S.C. 4503 to incur expenses for routine recognition items of extremely nominal value (e.g., pens, buttons, pins, name tags, etc.) and with the current practice in many agencies under which some routine forms of recognition, such as career service certificates, which are technically authorized under 5 U.S.C. 4503, are neither documented in the official personnel folder nor subject to formal nomination and approval procedures. (These interim regulations reflect material found in provisionally retained FPM Letter 451–11, Attachment 4, section 7–5b, February 9, 1993.)

Eligible Award Recipients

The interim regulations amend 5 CFR 451.104(f) to provide that awards may be granted to the legal heirs or estates of deceased employees. (These interim regulations reflect material found in provisionally retained FPM Chapter 451, Subchapter 3, section 3–2b, August 14, 1981.)

Application of the Two-Step Promotion Rule for Promotions from GS–1 and GS–2 Positions

The interim regulations amend 5 CFR 531.204 to provide a method for determining the dollar value of a two-step promotion when step increases above step 10 must be calculated for employees promoted from grades GS–1 and GS–2. Under the interim

regulations, at grades GS–1 and GS–2, for the purposes of promotion or transfer to a higher grade, the dollar value of each step increase above step 10 equals the dollar amount of the step increase between step 9 and step 10 of grade GS–1 and GS–2, as appropriate.

The dollar value of step increases at grades GS–1 and GS–2 varies. Consequently, the dollar amounts of the step increases above step 10 for grades GS–1 and GS–2 cannot be determined uniformly without an explicit rule. The amendment to § 531.204 provides agencies with uniform procedures for determining the amounts of the step increases above step 10 for GS–1 and GS–2 employees. (These interim regulations reflect guidance found in provisionally retained FPM Letter 531–56, February 16, 1982.)

Application of Leave Without Pay towards the Completion of Waiting Periods for Within-Grade Increases

The interim regulations amend 5 CFR 531.406 to provide uniform procedures for treating the time an employee is in a nonpay status for the purposes of determining whether the employee has completed a waiting period for a within-grade increase when the employee's scheduled tour of duty upon return to duty is different from the tour of duty at the time the leave without pay (nonpay status) began. The interim regulations require agencies to use the original tour of duty (from which the time in a nonpay status was charged) for the following purposes: (1) crediting the time in a nonpay status toward the completion of a waiting period for a within-grade increase; and (2) extending the waiting period if the time in a nonpay status exceeds the allowable amount.

Currently, the regulations provide that time in a nonpay status is creditable service in the computation of a waiting period if it does not exceed an aggregate of (1) 2 workweeks for steps 2, 3, and 4 (or comparable position in the rate range); (2) 4 workweeks for steps 5, 6, and 7 (or comparable position in the rate range); and (3) 6 workweeks for steps 8, 9, and 10 (or comparable position in the rate range). Time in a nonpay status in excess of the allowable amount extends a waiting period by the excess amount. The interim regulations ensure that employees are treated equitably by requiring agencies to compute the waiting period on the basis of the tour of duty in effect at the time the employee enters into a nonpay status and *not* on the tour of duty in effect at the end of the waiting period. These interim regulations reflect guidance found in provisionally retained FPM Letter 531–57, February 9, 1984.)

Counting Travel Time as "Hours of Work"

OPM is revising regulatory language in 5 CFR 550.112 and 551.422 regarding an agency's authority to establish a mileage radius from an employee's official duty station for determining entitlement to overtime pay for travel. The interim regulations relating to overtime entitlements under both title 5, United States Code (§ 550.112(j)), and the Fair Labor Standards Act of 1938, as amended (FLSA) (§ 551.422(d)), state that agencies may establish a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for overtime pay purposes. However, the interim regulations provide for one exception: An agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than an employee's "official station and post of duty" under the Federal Travel Regulation published by the General Services Administration. (An agency may establish more than one definition of official duty station for determining overtime pay for travel to be applied in different geographic locations. for example, an agency could have a large mileage radius in a remote rural area and a smaller radius in an urban area.)

The interim regulations establish parallel regulations for travel time as hours of work under both title 5 and the FLSA. The interim regulations revise the current requirement regarding travel time as hours of work under the FLSA so that an agency's definition of an employee's official duty station (including a mileage radius) that is used to determine entitlement to overtime pay for travel no longer has to be the same as that used by the agency to determine an employee's entitlement to per diem. Similarly, the definition of an employee's official duty station for purposes of overtime pay for travel need not necessarily be the same as that used to determine an employee's entitlement to locality pay, interim geographic adjustments, or special pay adjustments for law enforcement officers. Agencies may have different definitions of official duty station for different purposes. For example, the official duty station named on a notification of personnel action and used for geographic pay determinations must be a specific city, county, and state (or county and state in rural areas) to avoid confusion about entitlement to geographic pay entitlements. (These interim regulations revise guidance for travel time as hours of work under the FLSA found in provisionally retained FPM Letter 551–11, October 14, 1977, and incorporate similar provisions for FLSA-exempt employees. See former FPM letter 550–74, December 29, 1980.)

In addition, the interim regulations (for FLSA-exempt employees) provide in § 550.112(j)(2) that travel time between home and work is not hours of work and that the normal time spent in travel between home and work will be deducted from time spent traveling between home and a temporary duty location. This is parallel to current regulations in § 551.422(b) for determining overtime pay under the FLSA.

Sunday Premium Pay for Periods of Paid Leave and Excused Absence

The interim regulations in 5 CFR 550.171 revise the Sunday premium pay regulations in accordance with the decision of the United States Court of Appeals for the Federal Circuit in *Armitage, et al.* v. *United States* that employees who are regularly scheduled to work on Sunday are entitled to Sunday premium pay for periods of paid leave taken on Sundays. The regulations also state that employees covered by compressed work schedules are entitled to Sunday premium pay for the number of hours they are scheduled to work on Sundays. (These interim regulations reflect guidance found in provisionally retained FPM Letter 550–79, August 20, 1993.)

Payments During Evacuation

The interim regulations incorporate into 5 CFR part 550, subpart D, regulations published in FPM Supplement 990–2, Book 550, Appendix A, that may be adopted by agencies for making payments during evacuation in the United States and certain nonforeign areas. Governmentwide coordination of these regulations for Federal agencies is required by Executive Order 10982 of December 25, 1961. (The Secretary of State has prescribed similar regulations for civilian employees of Federal agencies who are located in foreign areas. These regulations are found in the Standardized Regulations (Government Civilians, Foreign Areas).)

The regulations provide for payments during an evacuation to employees or their dependents, or both, who are ordered to evacuate from or within United States areas because of imminent danger to their lives, such as natural disasters, or for military or other reasons.

Currently, if an agency adopts the agency regulations published in the FPM, the agency is required to notify

OPM of the date of adoption and of the areas in which the regulations would be applied. The interim regulations delete this notification requirement. Also, the interim regulations delete requirements for agency evacuation reports; however, each agency should develop its own internal monitoring system to ensure that its payments conform to the regulations. As required by section 4(b) of E.O. 10982, an agency that proposes to follow rules that differ from these regulations must secure prior approval from OPM. (These interim regulations reflect regulations found in provisionally retained FPM Supplement 990–2, Book 550, Appendix A. OPM does not plan to continue publishing the list of agencies having approved agency regulations for advance and evacuation payments that were published in provisionally retained FPM Supplement 990–2, Book 550, Appendix B.)

Back Pay Computations

The interim regulations clarify in 5 CFR 550.805(e)(1) that outside, "moonlight" employment engaged in by the employee both while Federally employed and erroneously separated is not to be deducted when computing the amount of back pay.

The regulations also revise the back pay computation rules in § 550.805(e)(2) by identifying the erroneous payments that must be deducted from a back pay award and enumerating the order in which such payments must be recovered. When an employee separates or retires from the Federal service, the employee typically receives certain payments, such as a refund of the employee's retirement contributions, severance pay, and/or a lump-sum payment for unused annual leave, as applicable. If the employee retires, he or she may also receive an annuity, and his or her health benefits and life insurance may be continued. When an employee is separated or retired from the Federal service because of an unwarranted or unjustified personnel action, such payments must be recovered by the Federal Government upon the employee's return to service. (These interim regulations reflect guidance found in provisionally retained FPM supplement 990–2, Book 550, subchapter S8.)

Computing Cost-of-Living Allowances for Employees Receiving Pay Retention

The interim regulations in 5 CFR 591.210 incorporate OPM's policy that an employee on pay retention who is entitled to a cost-of-living allowance or post differential is entitled to an allowance or differential computed as a percentage of his or her retained rate. (These interim regulations reflect guidance found in provisionally retained FPM Letter 591–50, July 26, 1989.)

Leave for Uncommon Tours of Duty

The interim regulations include a definition of "uncommon tour of duty" in 5 CFR 630.201, remove and reserve § 630.205, and revise § 630.210 to clarify how leave is accrued and charged when an agency establishes a special leave accrual and usage methodology for employees on uncommon tours of duty, such as firefighters who have 144-hour biweekly schedules (i.e., six 24-hour shifts).

The leave accrual rates for such employees must be directly proportionate to the rates for employees who accrue and use leave on the basis of an 80-hour biweekly schedule. For example, if a firefighter's leave is accrued and used on the basis of a 144-hour biweekly schedule, then the maximum annual leave accrual rate would be 14 hours per biweekly pay period, instead of the standard rate of 8 hours per biweekly pay period. (When 8 hours is multiplied by the factor of 144/80, the product is approximately 14. A special accrual rate of 24 hours would be used for the last full pay period in the calendar year to ensure equivalence in leave accrual over the entire year.) Such a firefighter would be charged leave proportionally for any applicable period of absence during the 144-hour uncommon tour of duty.

In addition, the regulations clarify how leave balances are recomputed for employees who convert to a different tour of duty for leave purposes. Leave balances must be converted to the proper number of hours based on the proportion of hours in the new tour of duty compared to the former tour of duty. For example, if a firefighter who accrues and uses leave based on a 144-hour biweekly tour of duty converts to a position in which he or she accrues and uses leave based on an 80-hour biweekly tour of duty, the converted leave balance is computed by multiplying the former balance by the factor of 80/144. (These interim regulations reflect guidance found in provisionally retained FPM Supplement 990–2, Book 630, S2–6b.)

Removal of Recordkeeping Requirements when Biweekly Pay Caps on Premium Pay Are Waived

The interim regulations eliminate the requirement in 5 CFR 550.106(d) that agencies document each determination to pay premium pay under the annual limitation for work performed in connection with an emergency. (Final regulations allowing agencies to waive the biweekly limitation on premium pay during an emergency, as provided by section 204 of the Federal Employees Pay Comparability Act of 1990, were published at 57 FR 31630, July 17, 1992.)

Agencies have found it difficult to retrieve the data necessary to comply with this recordkeeping requirement Therefore, OPM is amending its regulations to eliminate the need to document and keep certain records related to an emergency when an agency waives the biweekly premium pay limitation and uses the maximum annual earnings limitation for premium pay in its place. (These interim regulations are part of OPM's ongoing effort to reduce administrative burdens consistent with the goals of the National Performance Review.)

Waiver of Notice of Proposed Rule Making and Delay in Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking and making this rule effective in less than 30 days. These interim regulations reflect guidance found in provisionally retained FPM materials that will sunset on December 31, 1994. The delay in effective date is being waived to permit continuity in administering Governmentwide pay and leave administration rules.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal employees and agencies.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866

List of Subjects in 5 CFR Parts 451, 531, 550, 551, 591, and 630

Administrative practice and procedure; Claims; Decorations, medals, awards; Government employees; Law enforcement officers; Travel and transportation expenses; Wages.

U.S. Office of Personnel Management

James B. King,

Director

Accordingly, OPM is amending parts 451, 531, 550, 591, and 630 of title 5 of the Code of Federal Regulations as follows:

PART 451—INCENTIVE AWARDS

1. The authority citation for part 451 continues to read as follows:

Authority: 5 U.S.C. 4501–4507

2. In § 451.103, a new definition, *informal recognition items*, is added to read as follows:

§ 451.103 Definitions.

* * * * *

Informal recognition items means items of extremely nominal value granted as immediate, informal recognition of employee accomplishment.

* * * * *

3. In § 451.104, paragraphs (f) through (j) are redesignated as paragraphs (g) through (k), respectively, and a new paragraph (f) is added to read as follows:

§ 451.104 Policy.

* * * * *

(f) An award under this subpart may be granted to the legal heir or estate of a deceased employee.

* * * * *

4. In § 451.106, paragraph (b) is revised to read as follows:

§ 451.106 Responsibilities of the Office of Personnel Management.

* * * * *

(b) OPM shall review and approve or disapprove all recommendations for agency awards under this subpart that would grant an individual employee an award in excess of $10,000 but not over $25,000.

5. In § 451.107, paragraph (a)(3) is revised, paragraph (b) is redesignated as paragraph (c), and new paragraph (b) is added to read as follows:

§ 451.107 Agency responsibilities.

(a) * * *

(3) Award recommendations that would grant an individual employee an award in excess of $10,000 but not over $25,000; and

* * * * *

(b) Agencies that make expenditures for informal recognition items for distribution to employees shall establish criteria and procedures for granting and, as appropriate, documenting informal recognition items and for distinguishing such items from formal nonmonetary awards granted under this part.

* * * * *

PART 531—PAY UNDER THE GENERAL SCHEDULE

6. The authority citation for part 531 is revised to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981, and E.O. 12748, 56 FR 4521, February 4, 1991, 3 CFR 1991 Comp., p. 316;

Subpart A also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101–509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, December 30, 1991, 3 CFR 1991 Comp., p. 376;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2);

Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of FEPCA, Pub. L. 101–509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102–378, 106 Stat. 1356;

Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2);

Subpart E also issued under 5 U.S.C. 5336;

Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, November 29, 1993, 3 CFR 1993 Comp., p. 682.

Subpart B—Determining Rate of Basic Pay

7. In § 531.204, paragraph (a)(3) is added to read as follows:

§ 531.204 Special provisions.

(a) * * *

(3) When an employee at grade GS–1 or grade GS–2 is promoted or transferred to a higher grade, the amount of a step increase above step 10 of the employee's grade equals the amount of the increment between step 9 and step 10 of the grade from which promoted.

* * * * *

8. In § 531.406, the introductory text to paragraph (b)(2) is revised, paragraph (b)(3) is redesignated as paragraph (b)(4), and a new paragraph (b)(3) is added to read as follows:

§ 531.406 Creditable service.

* * * * *

(b) * * *

(2) Time in a nonpay status (based upon the tour of duty from which the time was charged) is creditable service in the computation of a waiting period for an employee with a scheduled tour of duty when it does not exceed an aggregate of:

* * * * *

(3) Except as provided in paragraph (c) of this section, time in a nonpay status (based upon the tour of duty from which the time was charged) that is in excess of the allowable amount shall extend a waiting period by the excess amount.

* * * * *

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

9. The authority citation for part 550 subpart A, is revised to read as follows.

Authority: 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5548, and 6101(c); E.O. 12748, 3 CFR 1991 Comp., p.316.

§ 550.106 Annual maximum earnings limitation for work in connection with an emergency. [Amended]

10. In § 550.106, paragraph (d) is removed, and paragraph (e) is redesignated as paragraph (d).

11. In § 550.112, paragraph (j) is added to read as follows:

§ 550.112 Computation of overtime work.

* * * * *

(j) *Official duty station.* An agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel under paragraph (g) of this section except that—

(1) An agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration (41 CFR 301–1.3(c)(4)); and

(2) Travel from home to work and vice versa is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work.

12. Section 550.171 is revised to read as follows:

§ 550.171 Authorization of pay for Sunday work.

An employee is entitled to pay at his or her rate of basic pay plus premium pay at a rate equal to 25 percent of his or her rate of basic pay for each hour of Sunday work which is not overtime work or for each hour while in a paid leave or excused absence status on Sunday and which is not in excess of 8 hours or, for an employee on a compressed work schedule, not in excess of the number of hours the employee is scheduled to work on Sunday for each regularly scheduled tour of duty which begins or ends on Sunday.

13. Subpart D of part 550, consisting of §§ 550.401 through 550.407, is revised to read as follows:

Subpart D—Payments During Evacuation

Authority: 5 U.S.C. 5527; E.O. 10982, 3 CFR 1959–1963., p. 502.

Subpart D—Payments During Evacuation

§ 550.401 Purpose, applicability, authority, and administration.

(a) *Purpose.* This subpart provides regulations to administer subchapter III (except sections 5524a and 5525) of chapter 55 of title 5, United States Code. The regulations provide for Governmentwide uniformity in making payments during an evacuation to employees or their dependents, or both, who are evacuated in the United States and certain non-foreign areas because of natural disasters or for military or other reasons that create imminent danger to their lives.

(b) *Applicability.* This subpart applies to—

(1) Executive agencies, as defined in section 105 of title 5, United States Code.

(2) Employees of an agency who are U.S. citizens or who are U.S. nationals;

(3) Employees of an agency who are not citizens or nationals of the United States, but who were recruited with a transportation agreement that provides return transportation to the area from which recruited; and

(4) Alien employees of an agency hired within the United States.

(c) *Authority.* The head of an agency may make advance payments and evacuation payments and pay special allowances as provided by this subpart. If the head of an agency proposes to issue regulations that deviate from the provisions of this subpart, prior approval of the agency regulations, as required by section 4(b) of Executive Order 10982 of December 25, 1961, must be secured from the Office of Personnel Management.

(d) *Administration.* The head of an agency having employees subject to this subpart is responsible for the proper administration of this subpart. Payment of advance payments and evacuation payments and any required adjustments shall be made in accordance with procedures established by the agency.

§ 550.402 Definitions.

Agency means an Executive agency, as defined in section 105 of title 5, United States Code.

Day means a calendar day, except when otherwise specified by the head of an agency.

Dependent means a relative of the employee residing with the employee and dependent on the employee for support.

Designated representative means a person 16 years of age or over who is named by an employee for the purpose of caring for a dependent.

Evacuated employee means an employee of an agency who has received an order to evacuate.

Order to evacuate means an oral or written order to evacuate an employee from an assigned area.

Safe haven means a designated area to which an employee or dependent will be or has been evacuated.

United States area means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and any territory or possession of the United States (excluding the Trust Territory of the Pacific Islands).

§ 550.403 Advance payments; evacuation payments; special allowances.

(a) An advance payment of pay, allowances, and differentials may be made to an employee who has received an order to evacuate, provided that, in the opinion of the agency head or designated official, payment in advance of the date on which an employee otherwise would be entitled to be paid is required to help the employee defray immediate expenses incidental to the evacuation.

(b) Evacuation payments of pay, allowances, and differentials may be made to an employee during an evacuation and shall be paid on the employee's regular pay days when feasible.

(c) Special allowances, including travel expenses and per diem, may be paid to evacuated employees to offset any direct added expenses that are incurred by the employee as a result of his or her evacuation or the evacuation of his or her dependents.

(d) An advance payment or an evacuation payment may be paid to the employee, a dependent 16 years of age or over, or a designated representative. When payment is made to someone other than the employee, prior written authorization by the employee must have been provided to the authorizing agency official.

(e) Any agency may make payments in an evacuation situation to an employee of another Federal agency (or his or her dependent(s) or personal representative) who has received an order to evacuate. When a payment is made under this subpart by an agency other than the employee's agency, the agency making the payment shall immediately report the amount and date of the payment to the employee's agency in order that prompt reimbursement may be made.

§ 550.404 Computation of advance payments and evacuation payments; time periods.

(a) Payments shall be based on the rate of pay (including allowances, differentials, or other authorized payments) to which the employee was entitled immediately before the issuance of the order of evacuation. All deductions authorized by law, such as retirement or social security deductions, authorized allotments, Federal withholding taxes, and others, when applicable, shall be made before advance payments or evacuation payments are made.

(b)(1) The amount of advance payments shall cover a time period not to exceed 30 days or a lesser number of days, as determined by the authorizing agency official.

(2) Evacuation payments shall cover the period of time during which the order to evacuate remains in effect, unless terminated earlier, but shall not exceed 180 days. When feasible, evacuation payments shall be paid on the employee's regular days.

(c) When an advance payment has been made to or for the account of an employee, the amount of the advance payment shall not diminish the amount of the evacuation payments that would otherwise be due the employee.

(d)(1) For full-time and part-time employees, the amount of an advance payment or an evacuation payment shall be computed on the basis of the number of regularly scheduled workdays for the time period covered.

(2) For intermittent employees, the amount of an advance payment or evacuation payment shall be computed on the basis of the number of days on which the employee would be expected to work during the time period covered. The number of days shall be determined, whenever possible, by approximating the number of days per week normally worked by the employee during an average 6-week period, as determined by the agency.

§ 550.405 Determination of special allowances.

In determining the direct added expenses that may be payable as special

allowances, the following shall be considered:

(a) The travel expenses and per diem for an evacuated employee and the travel expenses for his or her dependents shall be determined in accordance with the Federal Travel Regulation (FTR), whether or not the employee or dependents would actually be covered or subject to the FTR. In addition, per diem is authorized for dependents of an evacuated employee at a rate equal to the rate payable to the employee, as determined in accordance with the FTR (except that the rate for dependents under 11 years of age shall be one-half this rate), whether or not the employee or dependents would actually be covered or subject to the FTR. Per diem for an employee and his or her dependents shall be payable from the date of departure from the evacuated area through the date of arrival at the safe haven, including any period of delay en route that is beyond an evacuee's control or that may result from evacuation travel arrangements.

(b) Subsistence expenses for an evacuated employee or his or her dependents shall be determined at applicable per diem rates for the safe haven or for a station other than the safe haven that has been approved by appropriate authority. Such subsistence expenses shall begin to be paid on the date following arrival and may continue until terminated. The subsistence expenses shall be computed on a daily rate basis, as follows:

(1) The applicable maximum per diem rate shall be computed for the employee and each dependent who is 11 years of age or over. One-half of such rate shall be computed for each dependent under 11 years of age. These maximum rates may be paid for a period not to exceed the first 30 days of evacuation.

(2) If, after expiration of the 30-day period, the evacuation has not been terminated, the per diem rate shall be computed at 60 percent of the rates prescribed in paragraph (b)(1) of this section until a determination is made by the agency that subsistence expenses are no longer authorized. This rate may be paid for a period not to exceed 180 days after the effective date of the order to evacuate.

(3) The daily rate of the subsistence expense allowance actually paid an employee shall be either a rate determined in accordance with paragraphs (b) (1) and (2) of this section or a lower rate determined by the agency to be appropriate for necessary living expenses.

(c) Payment of subsistence expenses shall be decreased by the applicable per-person amount for any period during which the employee is authorized regular travel per diem in accordance with the FTR.

§ 550.406 Work assignments during evacuation; return to duty.

(a) Evacuated employees at safe havens may be assigned to perform any work considered necessary or required to be performed during the period of the evacuation without regard to the grades or titles of the employees. Failure or refusal to perform assigned work may be a basis for terminating further evacuation payments.

(b) When part-time employees are given assigned work at the safe haven, records of the number of hours worked shall be maintained so that payment may be made for any hours of work that are greater than the number of hours on which evacuation payments are computed.

(c) Not later than 180 days after the effective date of the order to evacuate, or when the emergency or evacuation situation is terminated, whichever is earlier, an employee must be returned to his or her regular duty station, or appropriate action must be taken to reassign him or her to another duty station.

§ 550.407 Termination of payments during evacuation.

Advance payments or evacuation payments terminate when the agency determines that—

(a) The employee is assigned to another duty station outside the evacuation area;

(b) The employee abandons or is otherwise separated from his or her position;

(c) The employee's employment is terminated by his or her transfer to retirement rolls or other type of annuity based on cessation of civilian employment;

(d) The employee resumes his or her duties at the duty station from which he or she was evacuated;

(e) The agency determines that payments are no longer warranted; or

(f) The date the employee is determined to be covered by the Missing Persons Act (50 App. U.S.C. 1001 et seq.), unless payment is earlier terminated under these regulations.

§ 550.408 Review of accounts; service credit.

(a) The payroll office having jurisdiction over the employee's account shall review each employee's account for the purpose of making adjustments at the earliest possible date after the evacuation is terminated (or earlier if the circumstances justify), after the employee returns to his or her assigned duty station, or when the employee is reassigned officially.

(b) The employee's pay shall be adjusted on the basis of the rates of pay, allowances, or differentials, if any, to which he or she would otherwise have been entitled under all applicable statutes other than section 5527 of title 5, United States Code. Any adjustments in the employee's account shall also reflect advance payments made to the employee under § 550.403(a) of this subpart.

(c)(1) After an employee's account is reviewed as required by paragraph (a) of this section, if it is found that the employee is indebted for any part of the advance payment made to him or her or his or her dependent(s) or designated representative, recovery of the indebtedness shall be effected by the payroll office having jurisdiction over the employee's account, unless a waiver of recovery has been approved. Repayment of the indebtedness may be made either in full or in partial payments, as determined by the head of the agency or designated official.

(2) Recovery of indebtedness for advance payment shall not be required when it is determined by the head of the agency or designated official that the recovery would be against equity or good conscience or against the public interest. Findings that formed the basis for waiver of recovery shall be filed in the employee's personnel folder on the permanent side.

(d) For the period or periods covered by any payments made under this subpart, the employee shall be considered as performing active Federal service in his or her position without a break in service.

Subpart H—Back Pay

14. The authority citation for subpart H of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5596(c); Pub. L. 100-202, 101 Stat. 1329.

15. In § 550.805, paragraph (e) is revised to read as follows:

§ 550.805 Back pay computations.

* * * * *

(e) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall deduct—

(1) Any amounts earned by an employee from other employment undertaken to replace the employment from which the employee had been separated by the unjustified or unwarranted personnel action during the period covered by the corrective action, but not including additional or

"moonlight" employment the employee may have engaged in both while Federally employed and erroneously separated; and

(2) Any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from a Federal employee retirement system, shall be returned to the appropriate system. Such payments shall be recovered from the back pay award in the following order:

(i) Retirement annuity payments (except health benefits and life insurance premiums);

(ii) Refunds of retirement contributions;

(iii) Severance pay;

(iv) Lump-sum payment for annual leave (and the annual leave shall be recredited for the employee's use under part 630);

(v) Health benefits and life insurance premiums, if coverage continued during the period of erroneous retirement; and

(vi) Other authorized deductions.

* * * * *

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

16. The authority citation for part 551 continues to read as follows:

Authority: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Pub. L. 93–259, 88 Stat. 55 (29 U.S.C. 204f).

Subpart D—Hours of Work

17. In § 551.422, paragraph (d) is added to read as follows:

§ 551.422 Time spent traveling

* * * * *

(d) Except as provided in paragraph (b) of this section, an agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel under this part. However, an agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration (41 CFR 301–1.3(c)(4)).

PART 591—ALLOWANCES AND DIFFERENTIALS

Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

18. The authority citation for part 591, subpart B, is revised to read as follows:

Authority: 5 U.S.C. 5941; E.O. 10000, 3 CFR, 1943–1948 Comp., p. 792; and E.O. 12510, 3 CFR, 1985 Comp., p. 338.

19. In § 591.210, paragraph (b)(1) is revised to read as follows:

§ 591.210 Payment of allowances and differentials.

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, allowances and differentials shall be calculated and paid as a percentage of an employee's hourly rate of basic pay, including a retained rate of pay under 5 U.S.C. 3594(c) or 5363, for those hours for which the employee receives basic pay, including all periods of paid leave, detail, or travel status outside the allowance or differential area. Allowances and differentials shall be included in any lump-sum payment for accumulated and current accrued annual leave issued under sections 5551 or 5552 of title 5, United States Code, to an employee who separates while in a duty status in the allowance or differential area.

* * * * *

PART 630—ABSENCE AND LEAVE

20. The authority citation for part 630 is revised to read as follows:

Authority: 5 U.S.C. 6311; § 630.303 also issued under 5 U.S.C. 6133(a); § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, June 16, 1965, 3 CFR 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332 and Public Laws 100–566 (102 Stat. 2834), and 103–103 (107 Stat. 1022); subpart J also issued under 5 U.S.C. 6362 and Public Laws 100–566 and 103–103; subpart K also issued under Public Law 102–25 (105 Stat. 92); and subpart L also issued under 5 U.S.C. 6387 and Public Law 103–3 (107 Stat. 6, 23).

Subpart B—Definitions and General Provisions for Annual and Sick Leave

21. In § 630.201, paragraph (b)(7) is redesignated as paragraph (b)(8), and a new paragraph (b)(7) is added to read as follows:

§ 630.201 Definitions.

* * * * *

(b) * * *

(7) *Uncommon tour of duty* means a tour of duty that exceeds 80 hours of work in a biweekly pay period, including hours of actual work plus hours in a standby status for which the employee is compensated by annual premium pay under 5 U.S.C. 5545(c)(1) and part 550 of this chapter.

* * * * *

22. Section 630.205 is removed and reserved.

§ 630.205 [Reserved]

23. Section 630.210 is revised to read as follows:

§ 630.210 Uncommon tours of duty.

(a) An agency may require that an employee with an uncommon tour of duty accrue and use leave on the basis of that uncommon tour of duty. The leave accrual rates for such employees shall be directly proportional (based on the number of hours in the biweekly tour of duty and the accrual rate of the corresponding leave category) to the standard leave accrual rates for employees who accrue and use leave on the basis of an 80-hour biweekly tour of duty. One hour (or appropriate fraction thereof) of leave shall be charged for each hour (or appropriate fraction thereof) of absence from the uncommon tour of duty.

(b) When an employee is converted to a different tour of duty for leave purposes, his or her leave balances shall be converted to the proper number of hours based on the proportion of hours in the new tour of duty compared to the former tour of duty.

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5 CFR Part 838

RIN: 3206–AG42

Child Abuse Accountability Act Implementation

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to implement the Child Abuse Accountability Act. The Act requires OPM to comply with certain court orders for the enforcement of a judgment rendered against an employee or retiree for physical, sexual, or emotional abuse of a child. These regulations are necessary to establish procedures under which OPM will receive and process court orders, determine the amounts available to satisfy a court order, and make payments under the Act.

DATES: Interim rules effective October 14, 1994; comments must be received on or before February 27, 1995.

ADDRESSES: Send comments to Reginald M. Jones, Jr., Assistant Director for Retirement Policy Development; Retirement and Insurance Group; Office of Personnel Management; P.O. Box 57; Washington, DC 20044; or deliver to OPM, room 4351, 1900 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Harold L. Siegelman, (202) 606–0299.

SUPPLEMENTARY INFORMATION: On October 14, 1994, the President approved the Child Abuse Accountability Act, Pub. L. 103–358. The Act requires OPM, as the administrator of the Civil Service Retirement System and basic benefits under the Federal Employees Retirement System, to comply with certain court orders for the enforcement of judgments rendered against employees or retirees for physical, sexual, or emotional abuse of a child. The Act was effective on October 14, 1994, and applies to court orders that OPM receives on or after that date. To implement the Act, we are issuing interim regulations to establish procedures for claimants to apply for benefits and for OPM to process claims under the Act.

These regulations apply only to benefits that OPM administers. The provisions of the Act relating to the Thrift Savings Plan are administered by the Federal Retirement Thrift Investment Board, an independent agency, and these regulations and the following discussion do not apply to such benefits.

1. Benefits affected by the Child Abuse Accountability Act

The statutory language places certain conditions on the availability of funds to comply with a court order. An analysis of the statutory language demonstrates that the Act covers only employee annuities and refunds of retirement contributions that are available for immediate payment.

The Act applies only to "Payments *which would otherwise be made,*" that is, payments for which the employee or retiree is immediately eligible. The statutory eligibility requirements that an employee must satisfy to be eligible for immediate payment include separation from the Federal service and application by the employee for payment, in addition to satisfaction of the specific statutory requirements that permit payment of a particular benefit. Money held by an employing agency or OPM that may be payable at some future date is not available for payment under court orders.

The Act applies only to "Payments *to an employee . . . or annuitant based on service of that individual.*" This language contains three limitations.

Only benefits to employees or annuitants are covered. Transfers of contributions between retirement systems are excluded because they are not payable to an employee or annuitant.

Only benefits based on service are covered. Payments based on voluntary contributions and refunds of excess contributions (which are deemed to be voluntary contributions at retirement) are excluded because such payments are not based on service.

Only benefits payable to the individual who performed the service that provides the basis for the benefit are covered. Death benefits are excluded by this language because, although they may be payable to an "annuitant," they are based on the service of the deceased individual, not the individual who is entitled to payment.

2. Garnishment procedures under part 581 apply

We apply the procedures established in subparts A through J of part 838 of Title 5, Code of Federal Regulations, to former spouse court orders. We apply the procedures established in part 581 of Title 5, Code of Federal Regulations, to garnishment orders for alimony and child support. Both the process that State authorities will follow and the varied form of orders that OPM will receive for child abuse judgment enforcement orders will be more like garnishment orders under part 581 than former spouse court orders under part 838.

The process applicable to child abuse judgment enforcement orders and garnishment orders for alimony and child support have several common elements. Both are dependent on enforcement procedures established by the State and subject to limitations that the State places on actions in the nature of garnishments. Both may be administrative orders, rather than court orders, if the State provides such a procedure. Former spouse court orders differ in both of these aspects.

In addition, all child abuse judgment enforcement orders are to collect amounts that have already been reduced to judgment. Although many garnishment orders are for current support obligations, many garnishment orders are to collect amounts past due. All former spouse court orders are treated as applying to current obligations. (*See* 5 CFR 838.234 requiring a temporary adjustment of the amount payable to a former spouse to satisfy an arrearage.)

Procedures applicable to actions in the nature of garnishment vary substantially among the States. Therefore, the types of documents that we will receive and procedures that we must follow for child abuse judgment enforcement orders will vary from State to State, like the documentation and procedures applicable to garnishments for alimony and child support. For example, some States require us to report the amount available for garnishment, and after we respond, they issue another order providing payment instructions. Others provide payment instructions in the first order. Therefore, our garnishment procedures are better suited to these variations than our procedures for former spouse benefits.

3. Section analysis

The amendment to section 838.101 of Title 5, Code of Federal Regulations, states that Subpart K applies to all child abuse judgment enforcement orders received on or after the effective date of the Child Abuse Accountability Act. OPM is not authorized to comply with child abuse judgment enforcement orders received before that date.

The amendment to section 838.102 of Title 5, Code of Federal Regulations, provides users of Title 5, Code of Federal Regulations, a cross reference to the regulation implementing the Child Abuse Accountability Act. This is intended to make the regulations easier to use.

The amendments to section 838.103 of Title 5, Code of Federal Regulations, adds definitions for two new terms, "child abuse debtor" and "child abuse judgment enforcement order" to describe the person entitled to benefits and the court or administrative order under the Child Abuse Accountability Act. The change in the definition of the term "net annuity" establishes that amounts already payable under a former spouse court order or a child abuse judgment enforcement order are not part of the "net annuity" that is available to satisfy additional orders that we receive later.

Subpart K establishes procedures and requirements for child abuse judgment enforcement orders. Section 838.1101 states the purpose and scope of the subpart.

Section 838.1111 restates the statutory rules concerning when funds are available for payment.

Section 838.1121 provides that the part 581 procedures apply to child

abuse judgment enforcement orders as discussed under item 2 of this supplementary information. Paragraph (b) repeats the rule under part 581 that we must comply with any order that appears valid on its face. The Supreme Court has upheld this limitation under the part 581 regulations in the case of *Morton* v. *United States*, 467 U.S. 822 (1984). Paragraph (c) provides a cross reference to the address at which OPM receives all orders affecting retirement benefits. This is the only correct address for service of process concerning child abuse judgment enforcement orders.

The table of amendments makes several conforming changes to existing regulations in Subpart A of part 838 so that the regulatory language in those sections includes references to the individuals and orders subject to the new subpart K.

4. Waiver of general notice of proposed rulemaking

Under section 553 (b)(3)(B) and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making these rules effective in less than 30 days. The regulations are effective on October 14, 1994, the effective date of the statutory change. The statute requires OPM to honor court orders received on or after the date of enactment. Delaying the processing of court orders for publication of a general notice of proposed rulemaking or the normal 30-day delay in effective date would be contrary to the public interest and the intent of the statute. Although later adjustments could be retroactive, such adjustments could seriously harm entitled persons with an immediate need for payment.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Federal employees and agencies and retirement payments to retired Government employees and their survivors.

List of Subjects in 5 CFR Part 838

Administrative practice and procedure, Claims, Disability benefits, Government employees, Income taxes, Pensions, Retirement, Courts.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending 5 CFR part 838, as follows:

PART 838—COURT ORDERS AFFECTING RETIREMENT BENEFITS

1. The authority citation for part 838 is revised to read as follows:

Authority: 5 U.S.C. 8347(a) and 8461(g). Subparts B, C, D, E, J, and K also issued under 5 U.S.C. 8345(j)(2) and 8467(b). Sections 838.221, 838.422, and 838.721 also issued under 5 U.S.C. 8347(b).

Subpart A—General Provisions

2. In section 838.101, paragraph (c)(3) is added to read as follows:

§ 838.101 Purpose and scope.

* * * * *

(c) * * *

(3) Subpart K of this part applies only to court orders received by OPM on or after October 14, 1994.

* * * * *

3. In section 838.102, paragraph (a)(7) is added to read as follows:

§ 838.102 Regulatory structure.

(a) * * *

(7) Subpart K of this part contains rules applicable to court orders for the enforcement of judgments rendered against employees or annuitants for physical, sexual, or emotional abuse of a child.

4. Section 838.103 is amended by adding in alphabetical order a definition of the terms "child abuse creditor," and "child abuse judgment enforcement order," and by revising the definition of the term "net annuity" to read as follows:

§ 838.103 Definitions.

Child abuse creditor means an individual who applies for benefits under CSRS or FERS based on a child abuse judgment enforcement order.

Child abuse judgment enforcement order means a court or administrative order requiring OPM to pay a portion of an employee annuity or a refund of employee contributions to a child abuse creditor as a means of collection of a "judgment rendered for physically, sexually, or emotionally abusing a child" as defined in sections 8345(j)(3)(B) and 8467(c)(2) of title 5, United States Code.

* * * * *

Net annuity means the amount of monthly annuity payable after deducting from the gross annuity any amounts that are—

(1) Owed by the retiree to the United States;

(2) Deducted for health benefits premiums under section 8906 of title 5, United States Code, and §§ 891.401 and 891.402 of this chapter;

(3) Deducted for life insurance premiums under section 8714a(d) of title 5, United States Code;

(4) Deducted for Medicare premiums;

(5) Properly withheld for Federal income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled;

(6) Properly withheld for State income tax purposes, if the amounts withheld are not greater than they would be if the retiree claimed all dependents to which he or she was entitled; or

(7) Already payable to another person based on a court order acceptable for processing or a child abuse judgment enforcement order.

Unless the court order expressly provides otherwise, *net annuity* also includes any lump-sum payments made to the retiree under section 8343a or section 8420a of title 5, United States Code.

* * * * *

5. Subpart K is added to read as follows:

Subpart K—Court Orders Under the Child Abuse Accountability Act

Sec.

Regulatory Structure

838.1101 Purpose and scope.

Availability of Funds

838.1111 Amounts subject to child abuse judgment enforcement orders.

Application, Processing, and Payment Procedures and Documentation Requirements

838.1121 Procedures and requirements.

Subpart K—Court Orders Under the Child Abuse Accountability Act

Regulatory Structure

§ 838.1101 Purpose and scope.

(a) This subpart regulates the procedures that the Office of Personnel Management will follow upon the receipt of claims arising out of child abuse judgment enforcement orders.

(b) This subpart prescribes—

(1) The circumstances that must occur before employee annuities or refunds of employee contributions are available to satisfy a child abuse judgment enforcement order; and

(2) The procedures that a child abuse creditor must follow when applying for a portion of an employee annuity or

refund of employee contributions based on a child abuse judgment enforcement order.

Availability of Funds

§ 838.1111 Amounts subject to child abuse judgment enforcement orders.

(a)(1) Employee annuities and refunds of employee contributions are subject to child abuse enforcement orders only if all of the conditions necessary for payment of the employee annuity or refund of employee contributions to the former employee have been met, including, but not limited to—

(i) Separation from the Federal service;

(ii) Application for payment of the employee annuity or refund of employee contributions by the former employee; and

(iii) Immediate entitlement to an employee annuity or refund of employee contributions.

(2) Money held by an employing agency or OPM that may be payable at some future date is not available for payment under child abuse judgment enforcement orders.

(3) OPM cannot pay a child abuse creditor a portion of an employee annuity before the employee annuity begins to accrue.

(b) Waivers of employee annuity payments under the terms of section 8345(d) or section 8465(a) of title 5, United States Code, exclude the waived portion of the annuity from availability for payment under a child abuse judgment enforcement order if such waivers are postmarked or received before the date that OPM receives the child abuse judgment enforcement order.

Application, Processing, and Payment Procedures and Documentation Requirements

§ 838.1121 Procedures and requirements.

(a) Except as otherwise expressly provided in this part, the procedures and requirements applicable to legal process under part 581 of this chapter apply to OPM's administration of child abuse judgment enforcement orders.

(b)(1) OPM will accept for processing any legal process under part 581 of this chapter that appears valid on its face.

(2)(i) After OPM has determined that a child abuse judgment enforcement order is valid on its face, OPM will not entertain any complaint concerning the validity of the order. Such complaints must be presented to authorities having jurisdiction to review the validity of the legal process.

(ii) OPM will not delay compliance with a child abuse judgment enforcement order based on any complaint concerning the validity of the order unless instructed to do so by an appropriate authority under the law of the jurisdiction issuing the legal process, the office of the United States Attorney for the jurisdiction issuing the legal process, or the U.S. Department of Justice.

(c)(1) The address for service of a child abuse judgment enforcement order is provided in appendix A to subpart A of this part.

(2)(i) OPM considers service of legal process by mailing or delivery of the child abuse judgment enforcement order to the designated address appropriate service notwithstanding more formal requirements imposed on creditors under State law.

(ii) OPM will execute forms required under a State procedure to waive any right to more formal procedures for service of legal process than specified in paragraph (c)(2)(i) of this section.

§§ 838.101, 838.122, 838.131, 838.134 [Amended]

7. In the list below, for each section and paragraph indicated in the left two columns, remove the material indicated in the third column where it appears in the paragraph, and add the material indicated in the fourth column:

Section	Paragraph	Remove	Add
838.101	(b)(2) ...	spouse .	spouse or child abuse creditor
838.101	(b)(3) ...	spouse .	spouse or child abuse creditor
838.122	(b)	spouses	spouses or child abuse creditors
838.122	(e)	spouse .	spouse or child abuse creditor
838.131	(b)(2) ...	spouse .	spouse or child abuse creditor
838.132	(b)	spouse .	spouse or child abuse creditor
838.134	(a)(1) ...	affect ...	relate to
838.134	(a)(1) ...	former spouses.	individuals (former spouses or child abuse creditors)
838.134	(a)(1) ...	issued ..	received by OPM
838.134	(a)(2) ...	spouse or separated spouse.	spouse, separated spouse, or child abuse creditor

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 318

[Docket No. 93–088–2]

Avocados From Hawaii

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations governing the interstate movement of Hawaiian fruits and vegetables to allow avocados to be moved from Hawaii into Alaska, accompanied by a limited permit and subject to certain conditions. This action is warranted because the climatic conditions in Alaska ensure that pests of avocados will not present a threat to agriculture in that State. This action relieves some restrictions on the interstate movement of avocados from Hawaii without presenting a significant risk of introducing injurious insects into the United States. We are also amending the regulations to clarify that limited permits may be issued by inspectors or by persons operating under compliance agreements, unless the regulations specify that the limited permit must be issued by an inspector.

EFFECTIVE DATE: December 28, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Victor Harabin, Head, Permit Unit, Port Operations, Plant Protection and Quarantine, APHIS, USDA, room 632, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–8645.

SUPPLEMENTARY INFORMATION:

Background

The Hawaiian Fruits and Vegetables regulations (contained in 7 CFR 318.13 through 318.13–17, and referred to below as the regulations) govern, among other things, the interstate movement from Hawaii of avocados in a raw or unprocessed state. Regulation is necessary to prevent the spread of the Mediterranean fruit fly (*Ceratatis capitata* (Wied.)), the melon fly (*Dacus cucurbitae* (Coq.)), and the Oriental fruit fly (*Bactrocera dorsalis* (Hendel)(Syn. *Dacus dorsalis*)). These types of fruit flies are collectively referred to as Trifly. The regulations have allowed avocados to be moved interstate from Hawaii to any destination in the United States only if, among other things, they have been treated in accordance with a treatment specified in either § 318.13–4d or § 318.13–4e of the regulations.

On February 25, 1994, we published in the **Federal Register** (59 FR 9136–

9140, Docket No. 93–088–1) a proposal to amend the regulations by adding a new § 318.13–4g to allow untreated avocados from Hawaii to be moved interstate to Alaska only, provided that certain conditions are met to help ensure that the avocados moved to Alaska are free from Trifly. We proposed these conditions, in addition to limiting movement only to Alaska, to minimize the risk to Alaskan apples and pears and to address the slight risk that some Hawaiian avocados might eventually move from Alaska to other States.

We solicited comments concerning our proposal for 60 days ending April 26, 1994. We received seven comments by that date. They were from State departments of agriculture, fruit growers associations, an agricultural marketing and trade association, and fruit growers and shippers. One comment was in favor of the proposed rule, three comments requested specific revisions to the proposed rule, and three comments opposed the proposed rule. We carefully considered all of the comments we received. They are discussed below.

One concern raised by commenters opposed to the proposed rule was that, although we proposed to allow avocados from Hawaii to be moved to Alaska only, there remains a risk that the avocados could be transshipped to the contiguous 48 States. These commenters cited, as an example of a case which demonstrated that transshipments can occur, an interim rule concerning Unshu oranges from Japan that we published in the **Federal Register** on September 3, 1985 (50 FR 35533, Docket No. 85–354). Prior to this interim rule, Unshu oranges were allowed to be imported into the State of Alaska without restriction. The interim rule added restrictions because inspection found that Unshu oranges were being moved from Alaska to other places in the United States.

While it is true that the illegal movement did occur, it should be explained that there were factors connected with the importation of Unshu oranges at that time that gave shippers incentive to violate the regulations by shipping their fruit to the contiguous 48 States. These factors would not be applicable to the interstate movement of avocados from Hawaii.

For example, Unshu oranges were not then grown in the United States. Fresh Unshu oranges were allowed to be imported into the United States exclusively from Japan, and only into Alaska. They were, therefore, not readily available in all U.S. markets. Unshu oranges are an expensive specialty fruit, often given as a gift during winter holidays. The demand for these oranges may not have been met by the severe restrictions on their importation into the United States, providing incentives for transshipment. In contrast, avocados grown in the United States are readily available in U.S. markets and are relatively inexpensive, especially in the western and southeastern States where they are grown. Moving the avocados from Alaska to the contiguous 48 States would not benefit shippers economically, as that practice did for shippers of Unshu oranges. Reshipping would significantly increase the shippers' packaging and shipping costs, offsetting any price advantage over California growers; and, since the U.S. demand for avocados is already being met by California and Florida growers, there is no incentive for shippers to violate the regulations in this way.

We have also considered the suggestion by some commenters that Hawaiian avocados may be moved inadvertently from Alaska to the contiguous 48 States by tourists or business travellers who would carry them in their luggage, pockets, or handbags. It is our belief that this is not likely to occur. Avocados are not generally eaten in travel, like an apple or banana, because they usually require some preparation, such as for use in a salad or dip. Also, avocados are expected to be more expensive in Alaska than in California or other southwestern States, so a business traveller would not likely buy his or her avocados in Alaska if he or she is returning to one of those States.

A few commenters cited a previous program of the Animal and Plant Health Inspection Service (APHIS) that permitted the interstate movement of untreated avocados from Hawaii, and that was discontinued because a Trifly infestation was discovered in Hawaii. Commenters stated that this experience calls into question the reliability of even commercial shipments of Hawaiian avocados being pest-free.

On February 25, 1992, fruit fly larvae were discovered in a Hawaiian avocado picked by an APHIS inspector from a tree in an orchard that shipped avocados to the contiguous 48 States. Soon after, a significant fruit fly infestation was discovered in the Kona area of Hawaii. This infestation affected some avocados that could have been shipped to the contiguous 48 States. For these reasons, the program referred to by commenters, which allowed the movement of untreated avocados from Hawaii to any destination in the United States, was suspended by APHIS on February 26, 1992, and was removed completely in an interim rule published in the **Federal Register** on July 15, 1992 (57 FR 31306–31307, Docket No. 92–081–1).

The situation presented risk to U.S. agriculture only because, at the time the infestation was discovered, APHIS was allowing avocados to move untreated to the mainland United States. It would not have presented any significant risk had the fruit been moving only to the State of Alaska, as we have proposed. Before APHIS implemented the program to allow Hawaiian avocados to move untreated to the mainland, Hawaiian avocados were permitted to move untreated to Alaska only. During that time, we had no evidence of any infestations of Trifly. However, even if an infestation had been present in Hawaii, Trifly would not have become established in Alaska because of Alaska's freezing winters. Again, the basis for our proposal to allow Hawaiian avocados into Alaska is that climatic conditions in Alaska would not allow for the establishment of pests of avocado in the United States. Because Hawaiian avocados will not be distributed in the contiguous 48 States and will only move through specified ports under strict conditions en route to Alaska, our previous experience with Hawaiian avocados that were to be moved to the mainland does not alter our decision to allow avocados from Hawaii into Alaska.

Some commenters are concerned that this rule will impose too many additional inspection responsibilities on the APHIS inspection staff in Alaska, as well as in Portland and Seattle. We believe, however, that APHIS' Plant Protection and Quarantine (PPQ) staffs at these ports are currently adequate to manage the additional inspections. We do not anticipate any difficulties in inspecting the small amount of Hawaiian avocados which we expect will be moving to Alaska.

One commenter was concerned that fruit flies could escape during transloading of the avocados in Portland or Seattle, and that a population could survive in those States long enough to infest summer fruits and migrate to California before winter arrives. Our experience indicates it is highly unlikely this scenario will occur. We proposed to allow transloading only under very strict conditions and only under the supervision of an APHIS inspector. Large amounts of fruits and vegetables that are prohibited entry into any part of the continental United States are currently transshipped through Portland and Seattle, and are often transloaded at those ports under the

same conditions that we proposed for Hawaiian avocados. There has never been any incidence of a pest escaping, establishing itself temporarily in Washington or Oregon, and then moving south to California.

There were a few commenters who had suggestions to revise the proposed rule. One commenter requested that we add provisions to the proposed rule to allow the Hawaiian avocados destined for Alaska to be commingled in a single shipping container with other tropical fruits that are destined for either Portland or Seattle. We are making no changes based on this comment. The proposal states that "(t)he avocados may not be commingled in the same sealed container with articles that are intended for entry and distribution in any part of the United States other than Alaska." We believe this provision is necessary because the avocados may carry Trifly and commingling with articles not destined for Alaska would pose a pest risk if those articles became infested with Trifly. In explaining the reason for the request, the commenter states that "(o)ften shipping costs can be greatly reduced if only partial shipments of avocados are ordered, providing the shipment can be made with other fruit for the same destination." According to our proposal, as long as all articles in the sealed container are destined for entry and distribution in Alaska, the avocados may be commingled with other commodities. However, if the other articles in the sealed container are destined for Portland or Seattle with the intention of distributing them in any part of the United States other than Alaska, the shipment would be prohibited for the reasons given in the proposed rule.

The same commenter also requested that APHIS allow Hawaiian avocados destined for Alaska to be commingled in a single shipping container with other tropical fruits moving to foreign destinations. The commenter asked that APHIS allow such shipments to be broken down in Portland or Seattle, with the avocados being sent on to Alaska and the other fruits being sent to their respective foreign destinations.

Section 318.13–17 of the regulations governs the transit of fruits and vegetables from Hawaii into or through the continental United States en route to foreign destinations. Paragraph (d) of this section states that "(f)ruits and vegetables shipped into or through the continental United States from Hawaii in accordance with this section may not be commingled in the same sealed container with articles that are intended for entry and distribution in the continental United States." "Continental United States" is defined in § 318.13–1 to include the State of Alaska. Therefore, in accordance with § 318.13–17, Hawaiian avocados moved to Alaska could not be commingled in a single shipping container with Hawaiian produce transiting the United States en route to foreign destinations. To allow such a scenario would mean that produce moving under different regulations would be commingled in a single shipping container. It would be operationally difficult to monitor the breakdown and movement of such a shipment to ensure that the avocados are actually moved to Alaska only and that the other produce is moved properly through the United States to its foreign destination. To help ensure that all produce is moved safely and in accordance with the regulations, we believe it is necessary to maintain that the Hawaiian avocados may only be commingled in a single shipping container with produce that is also moving to Alaska only. We are, therefore, making no changes based on this comment.

Another commenter suggested that we extend the proposed rule to allow avocados to be carried from Hawaii to Alaska by air passengers in their luggage under the following conditions: (1) In pit baggage on direct flights to Alaska only; (2) only during the months of October to March or April; (3) only "green ripe" avocados; and (4) only rough-skinned varieties with the stems intact. We are making no changes based on this comment, for several reasons. The proposed rule includes many provisions and safeguards to help minimize the risk that the avocados will be infested with Trifly, and to help ensure that the avocados are not diverted from their final destination in Alaska. For example, the proposal allows only commercial shipments of avocados to be moved from Hawaii to Alaska, since wild or "backyard" avocados could present a higher pest risk than commercially produced avocados. APHIS inspectors would have no way of knowing whether or not an avocado carried by an individual air passenger is commercially produced. Further, we proposed that the avocado shipments be accompanied from Hawaii to Alaska by a limited permit, as a means of documenting the movement of the shipment and ensuring it arrives at its final destination in Alaska. We would have no way of confirming whether or not avocados carried in a passenger's luggage were diverted en route to Alaska because there would be no limited permit. We also proposed strict packing requirements and that the avocados be moved in sealed containers and be transloaded only under specified conditions. These provisions further minimize the risk that Trifly would be introduced in the continental United States, should the avocados be carrying Trifly. We believe these precautions are necessary, and none of these precautions would be possible for air passenger luggage.

Finally, one commenter asked that we extend the proposal to allow all "fruits and vegetables otherwise prohibited movement into or through the continental United States" to be moved to Alaska under the same provisions as Hawaiian avocados. We are making no changes based on this comment. This rulemaking is only concerned with Hawaiian avocados. If, in the future, we determine that other fruits and vegetables prohibited movement into the continental United States can be safely moved to Alaska only, we will publish a separate proposed rule in the **Federal Register**.

Therefore, based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposal as a final rule.

Miscellaneous

We are amending the phrase "Approved by the Office of Management and Budget under control number 0579–0049" that appears at the end of § 318.13–4 by removing the number "0579–0049" and replacing it with the number "0579–0088". This change corrects a prior misprint.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**. Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon publication in the **Federal Register**.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

This rule will allow untreated avocados to be moved interstate from Hawaii to Alaska under certain

conditions. Avocados are not presently shipped from Hawaii to Alaska because required treatments do not make it economically feasible.

In 1992, the U.S. production of avocados, not including Hawaii, was approximately 290 million pounds. California produced approximately 86 percent of this total, with the Hass variety accounting for about 85 percent of California's production. The peak harvest season of the Hass variety is April through October. California supplied approximately 90 percent of Alaska's 1992 avocado market.

In 1992, Hawaii produced approximately 700,000 pounds of avocados. Thus, Hawaii's total production was less than 0.3 percent of the total U.S. avocado production for that year. There are about 100 farms in Hawaii that produce avocados. All of these farms would be considered small entities (defined as having sales of less than $500,000 annually), as the total value in 1992 for Hawaiian avocados was only $322,000. The Sharwil variety accounts for about 75 percent of Hawaii's avocado production. The peak harvest season for Sharwil avocados is November through May.

This rule change will positively affect Hawaiian avocado producers by providing an economically feasible place for them to ship avocados when there is a surplus in production. Although almost all of Alaska's avocados are supplied by California, the addition of a Hawaiian supply is unlikely to have a significant impact on Californian avocado producers. Before a suspension of shipments in 1992, the shipment of Hawaiian avocados to the contiguous 48 States peaked at only 100,000 pounds. Further, Californian avocados (Hass variety) and Hawaiian avocados (Sharwil variety) have different peak production seasons. As a result, their importation will overlap very little. The shipment of Hawaiian avocados will allow Alaska to have a continuous and varied avocado supply.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579–0088.

List of Subjects in 7 CFR Part 318

Cotton, Cottonseeds, Fruits, Guam, Hawaii, Plant diseases and pests, Puerto Rico, Quarantine, Transportation, Vegetables, Virgin Islands.

Accordingly, 7 CFR part 318 is amended as follows:

PART 318—HAWAIIAN AND TERRITORIAL QUARANTINE NOTICES

1. The authority citation for part 318 continues to read as follows:

Authority: 7 U.S.C. 150bb, 150dd, 150ee, 150ff, 161, 162, 164a, 167; 7 CFR 2.17, 2.51, and 371.2(c).

§ 318.13–1 [Amended]

2. Section 318.13–1 is amended as follows:

a. In the definition for *Compliance agreement* the reference "§ 318.13–4(e)," and the reference "and § 318.13–4g" are removed.

b. A definition for *Commercial shipment* is added, in alphabetical order, to read as set forth below.

c. In the definition for *Limited permit*, the introductory text is amended by adding the phrase "or a person operating under a compliance agreement" immediately following "inspector", and paragraph (1) is amended by removing the phrase ", in conformity with a compliance agreement".

§ 318.13–1 Definitions.

Commercial shipment. Shipment containing fruits and vegetables that an inspector identifies as having been produced for sale or distribution in mass markets. Such identification will be based on a variety of indicators, including, but not limited to: Quantity of produce, type of packaging, identification of grower and packing house on the packaging, and documents consigning the shipment to a wholesaler or retailer.

* * * * *

3. In § 318.13–2, the regulatory text of paragraph (a) is redesignated as paragraph (a)(1) and a new paragraph (a)(2) is added to read as follows:

§ 318.13–2 Regulated articles.

(a) * * *

(2) Avocados which have been moved to Alaska in accordance with § 318.13–4g are prohibited movement from Alaska into or through other places in the continental United States, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands of the United States.

* * * * *

4. In § 318.13–3, the regulatory text of paragraph (b) is redesignated as paragraph (b)(1) and a new paragraph (b)(2) is added to read as follows:

§ 318.13–3 Conditions of movement.

* * * * *

(b) * * *

(2) Avocados may be moved interstate from Hawaii to Alaska if the provisions of § 318.13–4g are met, and if they are accompanied by a limited permit issued by an APHIS inspector in accordance with § 318.13–4(c).

* * * * *

5. Section 318.13–4 is amended as follows:

a. A new paragraph (c)(3) is added to read as set forth below.

b. Paragraph (d) is amended by adding the phrase "under paragraph (c)(3) of this section" immediately following the words "limited permit".

c. At the end of this section, the OMB control number "0579–0049" is removed and the number "0579–0088" is added in its place.

§ 318.13–4 Conditions governing the issuance of certificates or limited permits.

* * * * *

(c) * * *

(3) Except when the regulations specify an inspector must issue the limited permit, limited permits may be issued by a person operating under a compliance agreement.

* * * * *

§ 318.13–4f [Amended]

6. In § 318.13–4f, paragraph (b)(2)(iii) is amended by removing the reference "§ 318.13–4(e)" and adding "§ 318.13–4(d)" in its place.

7. Section 318.13–4g is added to read as follows:

§ 318.13–4g Administrative instructions governing movement of avocados from Hawaii to Alaska.

Avocados may be moved interstate from Hawaii to Alaska without being certified in accordance with § 318.13–4 (a) or (b) only under the following conditions:

(a) *Distribution and marking requirements.* The avocados may be moved interstate for distribution in Alaska only, the boxes of avocados must be clearly marked with the statement "Distribution limited to the State of Alaska", and the shipment must be identified in accordance with the requirements of § 318.13–6.

(b) *Commercial shipments.* The avocados may be moved in commercial shipments only.

(c) *Packing requirements.* The avocados must have been sealed in the packing house in Hawaii in boxes with a seal that will break if the box is opened.

(d) *Ports.* The avocados may enter the continental United States only at the following ports: Portland, Oregon; Seattle, Washington; or any port in Alaska.

(e) *Shipping requirements.* The avocados must be moved either by air or ship and in a sealed container. The avocados may not be commingled in the same sealed container with articles that are intended for entry and distribution in any part of the United States other than Alaska. If the avocados arrive at either Portland, Oregon or Seattle, Washington, they may be transloaded only under the following conditions:

(1) *Shipments by sea.* The avocados may be transloaded from one ship to another ship at the port of arrival, provided they remain in the original sealed container and that APHIS inspectors supervise the transloading. If the avocados are stored before reloading, they must be kept in the original sealed container and must be in an area that is either locked or guarded at all times the avocados are present.

(2) *Shipments by air.* The avocados may be transloaded from one aircraft to another aircraft at the port of arrival, provided the following conditions are met:

(i) The transloading is done into sealable containers;

(ii) The transloading is carried out within the secure area of the airport—i.e., that area of the airport that is open only to personnel authorized by the airport security authorities;

(iii) The area used for any storage of the shipment is within the secure area of the airport, and is either locked or guarded at all times the avocados are present. The avocados must be kept in a sealed container while stored in the continental United States en route to Alaska; and

(iv) APHIS inspectors supervise the transloading.

(3) *Exceptions.* No transloading other than that described in paragraphs (e) (1) and (2) of this section is allowed except under extenuating circumstances (such as equipment breakdown) and when authorized and supervised by an APHIS inspector.

(f) *Limited permit.* Shipments of avocados must be accompanied by a limited permit issued by an APHIS inspector in accordance with § 318.13–4(c) of this subpart. The limited permit will be issued only if the inspector examines the shipment and determines that the shipment has been prepared in compliance with the provisions of this section.

Done in Washington, DC, this 20th day of December 1994.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–31893 Filed 12–27–94; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. 94–25]

RIN 1557–AB14

Risk-Based Capital Guidelines: Collateralized Transactions

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is issuing this final rule to amend the risk-based capital guidelines to lower the risk weight from 20 percent to zero percent for securities lending, repurchase agreement transactions, certain collateralized letters of credit, and other collateralized on- and off-balance sheet credit exposures. This final rule is needed to ensure that the risk weight assigned to transactions collateralized with cash or government securities more accurately reflects the minimal operational risk and the near absence of credit risk those transactions present. In addition, this amendment is intended to eliminate the disparity in the risk-based capital treatment of collateralized transactions in international markets, enabling national banks to compete more effectively with foreign banks, and achieves consistency with the capital rules applied to state-chartered banks that are members of the Federal Reserve System, and their holding companies.

EFFECTIVE DATE: December 31, 1994.

FOR FURTHER INFORMATION CONTACT: Roger Tufts, Senior Economic Advisor, Office of the Chief National Bank Examiner, (202) 874–5070; Tom Rollo, National Bank Examiner, Office of the Chief National Bank Examiner, (202) 874–5070; Ronald Shimabukuro, Senior Attorney, Legislative and Regulatory Activities, (202) 874–4460; or Elizabeth Milor, Financial Economist, Economic and Regulatory Policy Analysis (202) 874–5220; Office of the Comptroller of the Currency, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The OCC adopted its risk-based capital guidelines in 1989 to implement the International Convergence of Capital Measurement and Capital Standards of July 1988, as reported by the Basle Committee on Banking Supervision (Basle Accord). *See* 54 FR 4168 (January 27, 1989). These guidelines, developed in cooperation with the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve Board (FRB), provide minimum capital requirements that vary primarily on the basis of the credit risk profiles of the assets and off-balance sheet activities of banks.

Under the present OCC risk-based capital guidelines, all transactions collateralized by cash or government securities issued by OECD [1] countries are risk weighted at 20 percent.[2] However, some transactions collateralized with cash or near-cash assets expose banks to significantly less

[1] Organization for Economic Cooperation and Development (OECD). Under the risk-based capital guidelines, OECD countries include countries that are full members of the OECD plus countries that have concluded special lending arrangements with the International Monetary Fund (IMF) associated with the IMF's General Arrangements to Borrow. 12 CFR part 3, appendix A, section 1(c)(16).

[2] Specifically, 12 CFR part 3, appendix A, section 3(a)(2) assigns a 20 percent risk weight for:

(1) That portion of assets collateralized by the current market value of securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country;

(2) That portion of assets collateralized by the current market value of securities issued or guaranteed by United States Government-sponsored agencies;

(3) That portion of assets collateralized by the current market value of securities issued by official multilateral lending institutions of regional development institutions in which the United States is a shareholder or contributing member; and

(4) Assets collateralized by cash held in a segregated deposit account by the reporting national bank.

credit risk than other similar transactions. The purpose of this final rule is to amend the risk-based capital guidelines to lower the risk weight from 20 percent to zero percent for certain collateralized transactions that have little or no credit risk and only minimal operational risk. This will have a beneficial effect on banks by lowering the required capital on certain low-risk transactions.

Proposal

The OCC published a notice of proposed rulemaking (NPRM) on August 18, 1993 (58 FR 43822) soliciting comment on whether to permit certain transactions collateralized by cash or OECD government securities to qualify for the zero percent risk-weight category. Specifically, the OCC proposed that securities lending and repurchase agreement transactions, and certain collateralized letters of credit be included in the zero percent risk-weight category. After carefully considering the comments received, the OCC is issuing this final rule adopting the NPRM and including additional collateralized on- and off-balance sheet exposures in the zero percent risk-weight category.

Discussion

In developing the risk-based capital guidelines, the FRB, FDIC and OCC (banking agencies) initially proposed assigning transactions collateralized by cash or OECD government securities to a 10 percent risk-weight category. *See* 53 FR 8550, 8553 (March 15, 1988). Under the Basle Accord, signatory countries have some latitude in assigning risk weights to claims collateralized by cash or OECD government securities. Specifically, paragraph 39 of the Basle Accord provides:

> In view of the varying practices among banks in different countries for taking collateral and different experiences of the stability of physical or financial collateral values, it has not been found possible to develop a basis for recognising collateral generally in the weighting system. The more limited recognition of collateral will apply only to loans secured against cash or against securities issued by OECD central governments and specified multilateral development banks. These will attract the weight given to the collateral (i.e. a zero or a low weight).

When the banking agencies adopted the final risk-based capital guidelines, they eliminated the 10 percent risk-weight category in the interest of simplicity. *See* 54 FR 4168 (January 27, 1989). To limit the types of claims qualifying for the zero percent risk-weight category, the banking agencies assigned claims collateralized by cash and OECD central government securities, including securities unconditionally guaranteed by the U.S. government, to the lowest non-zero risk weight, which is 20 percent. *See* 54 FR 4173, 4174 (January 27, 1989).

Comments

The comment period for the NPRM closed on September 17, 1993. Twenty-four comments were received. The commenters represented a diverse group of banking interests consisting of 14 banks and bank holding companies, one banking subsidiary, four bankers' associations or trade groups, one federally sponsored agency, and four other interested parties. All commenters generally supported reducing both the risk weight applied to the transactions included in the NPRM and the proposed collateral margin requirement. Most commenters also supported extending the zero percent risk weight to a broader range of transactions.

The OCC invited comment on all aspects of the NPRM and posed four specific questions. The questions and the responses follow.

Question 1: Should additional requirements be established to ensure that only very low-risk transactions are assigned to the zero percent risk-weight category? For example, should the zero percent risk weight be available only to institutions that have appropriate management and operating systems in place?

Eleven commenters addressed this question, all indicating that they consider additional regulatory requirements unnecessary. Most commenters expressed the view that operating systems are best supervised through the examination process. One commenter thought that new requirements were not needed, because of the new annual audit requirement established under the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) (Pub. L. 102–242).

Question 2: Should the OCC establish a specific minimum positive margin required for collateralized transactions to qualify for the zero percent risk weight for those credit exposures with market values that experience normal volatility? Should the OCC require that national banks maintain margins in excess of this minimum for those exposures with more volatile market values?

A number of commenters indicated that the OCC should not establish a specific margin requirement under the risk-based capital guidelines. Eleven commenters cited the proposed daily mark-to-market and positive collateral margin requirements as sufficient for ensuring safety and soundness. The majority of these commenters stated that specific regulatory requirements could disrupt normal market operations, because the collateral margins are negotiated as part of the contract for many collateralized transactions. Two commenters stated that the Federal Financial Institutions Examination Council (FFIEC) guidelines provide adequate guidance for banks participating in the securities lending markets.[3] Four commenters suggested that, instead of establishing a collateral margin requirement, the OCC should use pro rata risk weighting, assigning only that portion of a transaction that has sufficient collateral to the zero percent risk-weight category.

Question 3: For some securities lending transactions, banks indemnify their clients against losses that could occur if the market value of the lent security exceeds that of the collateral provided. Should the OCC permit transactions with indemnification agreements that cover additional losses to qualify for the zero percent risk weight?

Four commenters supported excluding from the zero percent risk weight those collateralized transactions where a bank indemnifies a client against losses other than those arising from collateral shortages caused by changes in market values. However, most commenters suggested that indemnification agreements that cover additional losses should not exclude a collateralized transaction from the zero percent risk-weight category. Four commenters supported allowing the zero percent risk weight for transactions in which a bank indemnifies its client against all losses, if the client continuously maintains a positive collateral margin with the bank or its agent, or if a bank acts only as agent in a transaction.

Question 4: At this time, the OCC believes that this proposal would apply only to securities lending transactions, repurchase agreements, and certain collateralized financial guarantees. The OCC invites comment as to whether, in the current market place, there are other collateralized transactions that expose banks to minimal risk that have contracts structured to meet the collateral requirements of this proposal. The OCC is specifically interested in comments concerning (a) bank participation in collateralized markets for swap agreements and (b) bank issued

[3] These guidelines were issued to national banks by the OCC in Banking Circular 196, dated May 7, 1985.

collateralized letters of credit other than financial guarantees.

Eighteen commenters supported including all transactions collateralized with Treasury securities in the zero percent risk-weight category. Seven commenters supported including collateralized swap agreements, and three commenters supported extending the zero percent risk weight to all collateralized letters of credit. One commenter suggested that the OCC should assign all affiliate transactions, regardless of collateral, to the zero percent risk weight, because such transactions expose banks to the same insignificant credit risk as the collateralized transactions mentioned in the NPRM.

In addition to the questions presented in the NPRM, the commenters raised other significant issues. Two commenters mentioned that some otherwise qualifying collateralized transactions involving foreign jurisdictions would not qualify for the zero percent risk weight under the NPRM. For example, the NPRM discussed a requirement that a bank receiving collateral in the form of OECD government securities must have a perfected interest in those securities. If a bank counterparty operates in a foreign jurisdiction, these commenters noted that it may not be possible to obtain a perfected security interest for that transaction.

Two commenters recommended that transactions collateralized with either irrevocable letters of credit or government agency securities should be eligible for the zero percent risk-weight category, because these types of collateral provide the same degree of protection as government securities.

Twelve commenters urged the OCC to modify the NPRM to parallel that of the FRB, in order to maintain parity of capital treatment for collateralized transactions.

After careful consideration of all the comments received, the OCC adopts this final rule to permit national banks to assign to the zero percent risk-weight category the off-balance sheet transactions proposed in the NPRM. These off-balance sheet transactions include securities lending and repurchase agreement transactions, collateralized letters of credit that serve as financial guarantees, and certain collateralized credit exposures arising from off-balance sheet transactions. In addition, based on the comments received, the final rule allows national banks to include in the zero percent risk-weight category certain loans and other on-balance sheet credit exposures that are collateralized fully by cash or OECD government securities.

To qualify for a zero percent risk weight, the credit exposure must satisfy the following criteria:

(1) The bank's counterparty must maintain a positive collateral margin relative to the amount of the bank's exposure to that counterparty;

(2) The collateral either must be cash or securities issued or guaranteed by OECD central governments or U.S. government agencies;

(3) The bank must maintain control over the collateral. Cash collateral must be held on deposit by the bank or by a third-party for the account of the bank. OECD government securities posted by a counterparty must be held by the bank or by a third-party acting on behalf of the bank; and

(4) Where the bank is acting as agent for a customer in a transaction involving the lending or sale of securities, and the transaction is collateralized by cash or OECD government securities delivered to the bank, then (a) any bank indemnification is limited to no more than the difference between the market value of the securities and the collateral received, and (b) any reinvestment risk associated with that collateral is borne by the customer.

Collateral

Collateralized transactions differ from other types of transactions in that the bank's credit exposure is supported by a pledge of collateral. The degree of protection afforded by the collateral depends on the quality of the collateral and the legal effectiveness of the pledge.

This final rule limits the types of qualifying collateral to cash (both domestic and foreign currency) and OECD government securities. This limitation preserves the quality of the collateral because both cash and OECD government securities are liquid and readily marketable. With respect to the legal effectiveness of the pledge of collateral, this final rule requires that the bank must maintain control over the collateral. This requirement is different from the NPRM. First, this final rule does not require a bank to obtain a perfected security interest for OECD government securities pledged as collateral. This change was made in response to the comment that the perfection of a security interest may not be possible in certain transactions involving foreign jurisdictions. While the OCC believes that a perfected security interest generally should be obtained when possible, the OCC has considered this issue and shares the commenter's concern. As a result this final rule does not require the bank to obtain a perfected security interest in the collateral.

Second, the OCC believes that safe and sound banking practice requires that a bank exercise control over the collateral in order to protect the interest of the bank. If the collateral consists of cash, then the cash must be held on deposit by the bank or by a third-party for the account of the bank. To qualify for a zero percent risk weight, a third-party collateral arrangement must adequately insulate the bank from the credit exposure, and not introduce other significant risks.

Similarly, if the collateral consists of OECD government securities, then the bank must maintain control of the OECD government securities. In some instances, a bank may want to maintain actual possession over the OECD government securities. This final rule, however, makes clear that a third party, acting on behalf of the bank, may hold and administer the collateral for the bank.

A national bank may assign to the zero percent risk-weight category only those credit exposures for which the bank's counterparty maintains a positive collateral margin. In addition, if any component of a collateralized transaction is denominated in foreign exchange, then fluctuations in exchange rates also could result in changes in market value. Therefore, to qualify for the zero percent risk-weight category, a bank must ensure that its counterparty maintains a positive collateral margin with respect to fluctuations in interest rates, foreign exchange rates, or other market factors.

Bank Indemnification

This final rule clarifies an issue raised by the commenters. Where a bank is acting as agent for a customer in a securities lending transaction, the transaction qualifies for the zero percent risk-weight category provided that the bank's indemnification is limited. Under this final rule, any indemnification extended by a bank must be limited to no more than the difference between the market value of the securities lent and the market value of the collateral received, and any reinvestment risk associated with the collateral (either cash or OECD government securities) must be borne by the customer.

International Comparability of Capital Standards

In re-examining the capital treatment of transactions collateralized with cash and OECD government securities, the OCC noted that most foreign supervisors subscribing to the Basle Agreement

assign the zero percent risk weight to transactions collateralized with cash or OECD government securities. Reassigning these transactions to the zero percent risk-weight category under U.S. standards eliminates the disparate capital treatment.

Effective Date

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) (Pub. L. 103–325, 108 Stat. 2160) provides that the federal banking agencies must consider the administrative burdens and benefits of any new regulations that impose additional requirements on insured depository institutions. Section 302 also requires such a rule to take effect on the first day of the calendar quarter following final publication of the rule, unless the agency, for good cause, determines an earlier effective date is appropriate. Similarly, the Administrative Procedure Act requires a 30-day delayed effective date, unless the rule either relieves a restriction or the agency finds good cause. 5 U.S.C. 553(d)(1) and (3).

This final rule amend the risk-based capital guidelines to lower the risk weight from 20 percent to zero percent for certain transactions collateralized with cash or government securities. This final rule revises the risk weights to more accurately reflect the minimal operational risks of these transactions, corrects the disparity in the risk-based capital treatment of collateralized transactions in international markets, and provides consistency with the capital rules applied to state-chartered banks that are members of the Federal Reserve System, and their holding companies. The OCC believes that these benefits far outweigh any burden of complying with the requirements of this final rule. For these reasons, the OCC determines that, pursuant to section 302 of RCDRIA and 5 U.S.C. 553(d)(1) and (3), there is sufficient good cause to provide for an effective date of December 31, 1994. A year-end effective date allows banks to take advantage of this final rule for the first quarter of the new calendar year. Delay in implementation of this final rule, to the next calendar quarter would be unnecessary and contrary to the public interest because compliance would be more difficult and costly, and could require additional accounting adjustments and disclosures.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, it is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

This final rule benefits all national banks by assigning to the zero percent risk-weight category certain collateralized transactions, and by promoting competitive equality with other financial institutions. While the exact volume of collateralized transactions is unknown, the OCC believes that assigning these types of collateralized transactions to the zero percent risk-weight category will not significantly impact national banks, regardless of size.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

List of Subjects in 12 CFR Part 3

Administrative practice and procedure, Capital, National banks, Reporting and recordkeeping requirements, Risk.

Authority and Issuance

For the reasons set out in the preamble, appendix A of title 12, chapter I, part 3 of the Code of Federal Regulations is amended as set forth below.

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 3907, and 3909.

2. In appendix A to part 3, section 3 is amended by adding a new paragraph (a)(1)(viii), revising paragraph (a)(2)(iv), removing (a)(2)(xii), and redesignating paragraph (a)(2)(xiii) as (a)(2)(xii) to read as follows:

Appendix A to Part 3—Risk-Based Capital Guidelines

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Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items.

* * * * *

(a) * * *

(1) * * *

(viii) That portion of assets and off-balance sheet transactions collateralized by cash or securities issued or directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, provided that:[9a]

(A) The bank maintains control over the collateral:

(*1*) If the collateral consists of cash, the cash must be held on deposit by the bank or by a third-party for the account of the bank;

(*2*) If the collateral consists of OECD government securities, then the OECD government securities must be held by the bank or by a third-party acting on behalf of the bank;

(B) The bank maintains a daily positive margin of collateral fully taking into account any change in the market value of the collateral held as security;

(C) Where the bank is acting as a customer's agent in a transaction involving the loan or sale of securities that is collateralized by cash or OECD government securities delivered to the bank, any obligation by the bank to indemnify the customer is limited to no more than the difference between the market value of the securities lent and the market value of the collateral received, and any reinvestment risk associated with the collateral is borne by the customer; and

(D) The transaction involves no more than minimal risk.

(2) * * *

(iv) That portion of assets collateralized by cash or by securities issued or directly and unconditionally guaranteed by the United States Government or its agencies, or the central government of an OECD country, that does not qualify for the zero percent risk-weight category.

* * * * *

Dated: December 21, 1994.

Eugene A. Ludwig,

Comptroller of the Currency.

[FR Doc. 94–31729 Filed 12–27–94; 8:45 am]

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12 CFR Part 3

[Docket No. 94–24]

RIN 1557–AB14

Office of Thrift Supervision

12 CFR Part 567

[Docket No. 94–258]

RIN 1550–AA75

Risk-Based Capital Standards; Bilateral Netting Requirements

AGENCIES: Office of the Comptroller of the Currency (OCC), Department of the Treasury and the Office of Thrift

[9a] Assets and off-balance sheet transactions collateralized by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country include, but are not limited to, securities lending transactions, repurchase agreements, collateralized letters of credit, such as reinsurance letters of credit, and other similar financial guarantees. Swaps, forwards, futures, and options transactions are also eligible, if they meet the collateral requirements. However, the OCC may at its discretion require that certain collateralized transactions be risk weighted at 20 percent if they involve more than minimal risk.